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Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany

By JOACHIM HERRMANN*

In the fight against terrorism the United States government has tried to draw a line between proper and improper methods of interrogation and treatment of detainees. The question whether and to what extent torture and other kinds of ill-treatment might be justified is widely discussed in the United States today. To date, no satisfying answer has been found. There is doubt that a generally accepted answer could ever be found. In view of this dilemma it might be helpful to look beyond the borders of the United States to see what answers have been given elsewhere. This paper will explain how torture and other kinds of ill-treatment are outlawed by the United Nations, the Council of Europe, and – as an example of national legislation – in Germany.

I. Introduction

Criminal justice and torture have a long, common history that continues to the present day. There was a time when torture was, on the European continent, officially accepted as a necessary instrument for enforcing criminal justice. Under the Roman-Canon law of evidence the court could in cases of serious crimes convict the accused only upon the testimony of two unimpeachable eyewitnesses or upon his or her confession. Whenever there was some suspicion

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that the accused had committed a crime but two witnesses were not available and the accused refused to confess, the court could order an examination under torture. From the 13th to the 16th century torture was widely practiced in continental European countries to extract confessions.

In the course of the 16th century milder sanctions, such as penal servitude instead of the death penalty or corporal punishment, were introduced and the rigid law of evidence began to change. Less severe punishment could be imposed if there were neither two eyewitnesses nor a confession. As a consequence, the use of torture went into decline. Fundamental criticism of torture came with the Enlightenment and the Natural Law philosophy, a human rights oriented philosophy, in the 17th and 18th century. The idea that the state has absolute power over the individual was no longer accepted. The individual was given inalienable rights that could, in principal, not be invaded by the state. In addition, torture was criticized from a practical point of view. Cesare Beccaria, the famous Italian scholar of criminal justice, wrote in 1764 that torture is a perfect instrument for acquitting the criminal who is strong enough to tolerate the pain of torture, and for convicting the innocent person who is too weak to suffer. In view of this criticism torture was, starting with the late 17th century, gradually abolished in the continental European countries.

This was, however, not the end of torture in Europe. In the 20th century totalitarian régimes came into power in the Soviet Union, Germany, and several other European countries. Citizens lost the freedom they had gained during times of individual liberalism. They were turned into subordinates who were subject to the dictates of the state. Police and other government institutions felt free, on a large scale and systematically, to practice torture as an instrument to exercise power. They acted without any legal authorization and, therefore, committed their atrocities mainly in secret. As is well known, this brought tremendous amounts of pain and suffering not only to individual persons but also to whole groups of people.

It did, therefore, not come as a surprise that after the end of World War II steps were taken on a national and international level to build barriers against the barbarism the world had experienced. Legislation was passed domestically, and international treaties were concluded to ban the use of torture. As a consequence, in European countries today three legal barriers against torture can be identified – national legislation, the United Nations instruments and European

instruments.

II. Legal Barriers Against Torture on Three Levels

A. National Legislation – Germany

The German Constitution provides that a detained person may not be subjected to mental or physical ill-treatment. There is, however, no provision in the Constitution explicitly outlawing torture. Following continental European tradition, the protection of individual rights in the German Constitution is phrased in abstract and general terms. The German Constitution places human dignity at the center of individual rights by declaring in its first Article that “the dignity of man is inviolable” and that it is the duty of all public authority to “respect and protect” it. Together with the constitutional provision that “everybody has a right to physical integrity” the human dignity-clause is construed to forbid torture and any cruel, inhuman and degrading treatment or punishment. To make this protection effective the German Constitution guarantees that anyone whose rights have been violated by a public authority can file a complaint with the courts. Courts are considered to be the watchdog responsible for protecting the individual against invasions by governmental powers.

In view of the atrocities committed by criminal justice authorities during times of Nazi dictatorship, special provisions were added in 1950 to the German Criminal Procedure Code prohibiting improper methods of interrogating suspects, the accused, and witnesses. The Code provides that a person’s “freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as [it] is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions” is prohibited.¹ To enforce the prohibitions, the Criminal Procedure Code provides that statements obtained in violation of these rules may not be used as evidence, even if the interrogated person agrees to their use.

There can be no doubt that these prohibitions set, to some

1. F.R.G. CRIM. P. CODE § 136a (1) *available at* <<http://www.iuscomp.org/gla/statutes/StPO.htm#136a>>.

extent, higher barriers for the interrogation activities of German criminal justice authorities than the prohibitions of torture, cruel, inhuman and degrading treatment that exist on an international level. Fatigue and deception which are outlawed under German law are generally not considered part of torture, cruel, inhuman or degrading treatment in the international arena. German courts held, for example, that a confession could not be used as evidence in a case where the police told the suspect that they had overwhelming evidence of his guilt even though they had only little suspicion.² Likewise, a confession was excluded where the police had, without interruption, interrogated the suspect for thirty hours.³ The reason for these strict standards is the idea that the free will of the individual and human dignity must be protected in a comprehensive way.

The protection against torture, cruel, inhuman and degrading treatment is also enforced with the help of German criminal law. The German Penal Code provides criminal sanctions for causing bodily injury, coercion, and extraction of testimony by duress.

The Rome Statute of the International Criminal Court defines in Articles 7 and 8 crimes against humanity and war crimes. Both Articles include acts of torture. The Rome Statute was ratified by Germany, so its provisions have become part of German law. Consequently, acts of torture defined in Articles 7 and 8 can be punished by German courts.

B. United Nations Instruments and Institutions

The Universal Declaration of Human Rights of 1948 was the first United Nations instrument to prohibit torture as well as cruel, inhuman or degrading treatment or punishment. This provision was reproduced in Article 7 of the International Covenant on Civil and Political Rights that was adopted by the General Assembly in 1966 and entered into force in 1976. Article 7 went, however, an important step beyond the Universal Declaration, because it prohibits medical or scientific experimentation without the free consent of the person concerned. Unlike other Articles protecting human rights in the

2. 35 Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Strafsachen (BHSt) 328 (1988) (F.R.G.). (translated by author)

3. 13 Bundesgerichtshof, Entscheidungen des Bundesgerichtshofes in Strafsachen (Federal Appellate Court in Criminal Matters) 60 (1959) (F.R.G.). (translated by author)

International Covenant, Article 7 does not allow any exceptions to be made in case of emergency. On the other hand, the International Covenant does not institute any mechanism for enforcing or supervising the protection of human rights. It is, rather, left to the signatory states to take the necessary steps for protecting the individual.

As torture was at the time still widely practiced in many countries, the Swedish Government took the initiative and brought the subject before the United Nations General Assembly in 1973. Upon a Swedish proposal the General Assembly in 1975 adopted the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment. The Declaration was a non-binding instrument but it defined, for the first time, the concept of torture and it listed measures to be taken by individual countries to abolish torture.

Again upon a Swedish suggestion, the General Assembly agreed in 1977 that work on a binding treaty prohibiting torture should be started. Because of political controversies it took a long time before the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was finally adopted by the General Assembly in 1984. The Convention which entered into force in 1987 can, however, only be considered a first step towards improving legal barriers against torture.

The Convention contains an official definition of torture. According to the definition, torture comprises three elements. An act must inflict severe, physical or mental pain and suffering; the act must be committed intentionally; and the act must be committed for a purpose, such as obtaining a confession or punishing someone.

The Convention provides, however, for important exceptions from the definition of torture. "Pain or suffering arising only from, inherent in or incidental to lawful sanctions" is not considered part of torture.⁴ This clause, which obviously is a product of political compromise, opens the door to diluting the protection the Convention is supposed to bring. Islamic signatory states are allowed to continue imposing traditional sanctions, such as stoning, flogging or amputations of hands, as long as such sanctions are authorized by

4. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ga. Res. 39/46, art. 1(1), U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

their national laws.

The Convention does not try to define cruel, inhuman or degrading treatment or punishment. The reason is that the Convention is mainly concerned with the suppression of torture. It is left to the signatory states to prevent in their territories acts of cruel, inhuman or degrading treatment or punishment. The signatory states are required to take steps necessary to prohibit torture and other acts of ill-treatment.

The Convention establishes a system of international supervision with the help of the Committee against Torture. The Committee consists of ten experts who meet twice a year in Geneva. Signatory states are obligated to report to the Committee on their activities under the Convention every four years.⁵ In addition, the Committee relies on a great number of reports submitted by non-government organizations.

The Committee can start its own inquiries if it is informed that torture is systematically practiced in a country, but its power to investigate is limited. Signatory states and victims of torture can, under certain conditions, file a complaint with the Committee, but after investigating the case the Committee can only communicate its views to the parties concerned. The Committee is a non-judicial institution and, therefore, not authorized to make decisions on individual complaints or award compensation.

During the debates on the Convention against Torture, Costa Rica presented in 1980 a draft of an Optional Protocol proposing a more effective control of torture. According to this Protocol, international inspection teams would be authorized to visit, on their own initiative, prisons, detention facilities, and other places where torture was allegedly practiced. It was argued that unannounced visits would help reveal instances of torture. Reports published by the inspection teams were expected to have a general deterrent effect. This proposal was, however, not successful because of opposition from several countries.

Some years later, the proposal to have visits by international inspection teams was back on the United Nations' agenda. In 2002 the General Assembly adopted the Optional Protocol to the Convention against Torture. The Optional Protocol took an important step beyond the Convention by providing for, among other

5. See *id.* at arts. 17-24.

things, a Subcommittee on Prevention that is authorized to pay regular visits to signatory states. The states are obligated to grant members of the Subcommittee unrestricted access to any place where a person is or may be detained. Ad hoc visits are, however, not permitted under the Protocol. States must provide the Subcommittee with all relevant information it might request. The Subcommittee may make recommendations and observations but it has no authority to decide a case. To date, the Optional Protocol has not entered into force because it has not been ratified by the required number of countries.

Germany is among the countries that have not yet ratified the Optional Protocol, but ratification procedures have begun. Germany has ratified both the International Covenant and the Convention against Torture, so they have become part of German national law.

As required by the Convention against Torture, Germany submitted several reports to the Committee against Torture. In its comments on the German reports, the Committee criticized, among other things, that “the precise definition of torture, as contained in Article 1 of the Convention, has still not been integrated into the German legal order.”⁶ This criticism does not seem well founded because Article 1 became part of German law after Germany ratified the Convention. In addition, all instances of torture listed in Article 1 of the Convention are crimes under the German Penal Code.

Another criticism leveled by the Committee against Torture was to be taken more seriously. The Committee was concerned about “the large numbers of reports of police-ill-treatment, mostly in the context of arrest” that it had received from non-governmental organizations.⁷ The Committee also pointed out that in several cases German authorities levied criminal defamation charges against persons who had complained about ill-treatment by a police officer. German authorities’ answer to this criticism was that each individual case reported by the Committee was carefully investigated to make sure that ill-treatment by the police would be discontinued. It must be pointed out, however, that the German media continues to report cases of ill-treatment by the police.

6. Concluding Observations of the Committee against Torture: Germany, Nov. 5, 1998, A/53/44, para. 185, *available at* <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.53.44,paras.179-195.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.53.44,paras.179-195.En)>.

7. *Id.* at para. 186.

C. European Instruments and Institutions

i. European Conventions

Protection against torture in Europe is structured in a way similar to that of the United Nations. European protection is, however, more comprehensive and considerably more effective than protection by the U.N. instruments.

In 1950 the Consultative Assembly of the Council of Europe adopted the European Convention on Human Rights and Fundamental Freedoms. The Council of Europe was founded in 1949 to promote the unity of European democracies. It is an institution different from the European Union, which did not yet exist at that time. The European Convention of 1950, which became effective in 1953, is an international treaty comparable to the International Covenant of the United Nations. Article 3 of the European Convention provides that "no one shall be subject to torture or inhuman or degrading treatment or punishment."

Unlike the U.N. instrument, Article 3 does not explicitly prohibit "cruel" treatment or punishment. The reasons for excluding "cruel" are not recorded. Obviously, "cruel" was considered unnecessary because it is covered by torture and inhuman treatment or punishment. Continental European legislation tends to be concise, omitting details not considered necessary.

Like the International Covenant, the European Convention provides that no exception can be made from the prohibition of torture. The prohibition must also be enforced in times of war or other national emergencies.

Germany ratified the European Convention in 1952, so its provisions have become part of German national law. Technically, the Convention is accorded the rank of an ordinary German statute, but there is general agreement in Germany that the Convention has a somewhat higher status. Contrary to the rule that later legislation takes priority over older law, a German statute enacted after ratification of the Convention could not simply abrogate its provisions. All German law must be interpreted as to conform to the requirements of the Convention because the legislature is presumed not to violate Germany's international obligations when enacting new legislation. In addition, the Convention is considered a special instrument for the protection of human rights that must take

precedence over ordinary statutes.

Following the model of the United Nations Convention against Torture, the Council of Europe adopted in 1987 the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Germany ratified the European Anti-Torture Convention in 1989, and, in the same year, the Convention became effective.

Unlike the United Nations Convention, the European Anti-Torture Convention does not define torture. It was feared that a definition listing particular instances to be considered torture could be dangerous, because what is not explicitly prohibited might be taken as allowed. Following continental European tradition, definitions are generally not included in legislation.

ii. The European Anti-Torture Committee

To strengthen the protection against torture, the European Convention established an Anti-Torture Committee with powers similar to the ones Costa Rica had in 1980 proposed to the United Nations. However, delegations of the European Anti-Torture Committee carry out periodic visits to member states of the Council of Europe. Delegations may also pay ad hoc visits to individual states. The state to be visited must be notified of an intended visit, but an ad hoc visit may take place immediately after notification. The delegation is authorized to inspect any place where persons are detained and conduct interviews in private. The visits are comparable to the visits conducted by the International Committee of the Red Cross.

After a visit the Anti-Torture Committee will draw up a report and, if necessary, make recommendations. The purpose of the report is not to condemn a state but to improve the protections against torture. A state that receives a report of the Committee has a right to answer. Under the Anti-Torture Convention cooperation between the Committee and the individual state should be strictly confidential. If a state does not cooperate, or refuses to follow recommendations, the Committee may issue a public statement.

Today, most reports of the Anti-Torture Committee are published with the consent of the states concerned. For example, in December 2005 the Anti-Torture Committee published a report on a visit a delegation had conducted in Germany. The report explained which places the delegation had visited and which officials it had

interviewed, but the Committee saw no reason to suggest any changes. However, after recent visits to other states, mainly states in Eastern and South-Eastern Europe, the Anti-Torture Committee often considered it necessary to make recommendations for improving the position of detained persons. Consultations between the Committee and the states took place and in most cases the states published an answer explaining what steps they were going to take to strengthen the protection of detainees.

In day-to-day practice the European Anti-Torture Committee seems to function as an effective control mechanism. Reports published by the Committee show that it carried out rather thorough investigations and that it entered into close cooperation with the individual states. Such cooperation is possible because all European states are neighbors, with most of them living under the common roof of the European Union. In view of this it remains to be seen whether the United Nations Subcommittee on Prevention of Torture will be able to exercise similarly tight control once the Optional Protocol will have entered into force.

Another question is whether the United Nations Committee against Torture and the European Anti-Torture Committee are doing the same job. Is it really necessary that the two institutions, one residing in Strasbourg, France, the other nearby in Geneva, Switzerland work side by side as far as the supervision of European countries is concerned? The problem will become even more urgent once the United Nations Optional Protocol will have entered into force and the United Nations Subcommittee on Prevention will, like the European Anti-Torture Committee, pay regular visits to signatory states. It would seem advisable to coordinate, if not integrate, their functions on a European level.

iii. The European Court of Human Rights

In addition to the European Anti-Torture Committee there is still another European institution to enforce the protections against torture. As provided by the European Convention on Human Rights, the European Court of Human Rights was set up in 1959. This Court, which is located in Strasbourg, serves as a watchdog to enforce the rights guaranteed by the Convention. European citizens who have exhausted all remedies before their national courts may lodge a complaint with the European Court claiming that one of their rights protected by the Convention was violated. Review by the European

Court has turned out to be an effective tool, because the Court has held, in a great number of cases, that national law was not in conformity with the requirements of the European Convention. There are also a considerable number of cases in which the Court found a failure to comply with the prohibition of torture provided for by Article 3 of the Convention. Over the years the European Court has developed rich case law interpreting the concepts of torture, inhuman and degrading treatment or punishment.

In its judgments the European Court determines whether or not a state violated a provision of the Convention. Judgments of the Court are declaratory rather than prescriptive; the Court has no power to repeal national legislation or quash administrative or judicial decisions. Judgments are, however, binding on the respondent state because they obligate the state to take the necessary remedial measures. In some cases, European states have had to change their national legislation in order to make it conform to the requirements of the European Court. Decisions of the European Court are binding only on the parties in the individual case, but they often serve as guidelines for all European states to follow.

If the European Court finds that there has been a violation of the European Convention, it may award “just satisfaction” to the injured party.⁸ The Court may order the respondent state to pay compensation for monetary and non-monetary damages.

Following its policy of not directly interfering with national law, the European Court has never held that improperly obtained evidence must be excluded. As a consequence, the Court has refused to exclude evidence procured by torture, even though torture must be considered a most serious violation of the human rights the European Convention protects. The Court has concluded that “it is not for the Court to substitute its views for that of the national courts which are primarily competent to determine the admissibility of evidence.”⁹

Originally there was also a European Commission of Human Rights, which served as a filtering body before cases could go up to the European Court. Complaints of alleged breaches of the Convention had to be brought before the Commission. If the Commission did not manage to obtain a friendly settlement it drew

8. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221, art. 41.

9. *Mialhe v. France*, 1996-IV Eur. Ct. H.R.

up a report and the case went through several procedural steps until it was eventually presented to the Court. To simplify the supervisory machinery of the Convention and to strengthen its judicial character the Commission was abolished in 1998. Today, complaints can be lodged directly with the Court. Reports the Commission prepared during its existence are, however, still an important source of information as to the interpretation of the Convention.

III. Article 3 of the European Convention

A. Definitions

i. Torture

The European Commission made the first attempt to define torture and to distinguish it from inhuman and degrading treatment or punishment in 1969 in the case of *Denmark et al. v. Greece*.¹⁰ The case was concerned with the deplorable conditions in Greek detention facilities where political prisoners were kept after a coup of the Greek Army. The Commission stated that treatment or punishment is inhuman if it deliberately causes severe physical or mental suffering.¹¹ Torture was defined as a particularly serious and aggravated form of inhuman treatment committed deliberately and with the purpose of obtaining information or inflicting punishment. Degrading treatment or punishment constitutes a category by itself requiring severe humiliation or coercion of a person to act against his or her own will or conscience.¹²

The Commission's definition of torture is similar to the definition in the United Nations Convention against Torture. Provisions of the United Nations Convention are not binding on European institutions but they are used in interpreting European law.

In practice, torture and inhuman treatment are mainly

10. 12 Y.B. Eur. Conv. on H.R. 1 (1969). However, note that under paragraph no. 156 the Report indicates that it will deal with torture in Chapter IV, but Chapter IV was not included in the published report. For an explanation see: C. Danelius, *Protection Against Torture in Europe and the World*, in *The European System for the Protection of Human Rights*, 263, 267 (Macdonald, Matscher, and Petzold, eds., 1993).

11. *Id.*

12. *Id.*

distinguished on the basis of the difference in the intensity of the suffering inflicted. Factors to be used in measuring the intensity of suffering are the duration of the ill-treatment, its physical and mental effects, the victim's sex, age and state of health, and the manner and method of the treatment.¹³ Acts which inflict pain of great severity are generally considered torture, irrespective of the sex, age and mental constitution of the victim.¹⁴

The landmark case of *Ireland v. United Kingdom*¹⁵ shows, however, that a fixed line cannot easily be drawn between torture and inhuman treatment. The case involved the "five techniques" the British police had used when interrogating alleged Irish terrorists. The "five techniques" were similar to the ones that members of the United States Army in more recent times have used in the Abu Ghraib prison in Baghdad. Detainees' heads were covered with dark bags; detainees were subjected to continuous loud noise; they were deprived of sleep, food and drink and they were forced to stand for long periods in stress positions.¹⁶ The European Commission concluded in 1972 that the "five techniques" constituted torture. However, five years later the European Court classified the "five techniques" only as inhuman and degrading treatment.¹⁷ The Court reasoned that the "five techniques" did not cause "suffering of the particular intensity and cruelty implied by the word torture."¹⁸ Perhaps the Court was to some extent motivated by political considerations. The Court might have been reluctant to attach the special stigma of torture to the United Kingdom.

It took until 1996 before the European Court in the case of *Aksoy v. Turkey*¹⁹ determined, for the first time, that police activities amounted to torture. In this case Turkish police had tied the arms of an alleged member of the Kurdish autonomy movement together behind his back and suspended him by his arms. As a consequence, both arms were paralyzed. In later cases the Court have considered police activities to be torture where a Kurdish woman was raped in

13. *Selmouni v. France*, 1999-V Eur. Ct. H.R.; *Price v. the United Kingdom*, 2001-VII Eur. Ct. H.R.

14. *Selmouni v. France*, 1999-V Eur. Ct. H.R.

15. 25 Eur. Ct. H.R. 1 (1978).

16. *Id.*

17. *Id.*

18. *Id.*

19. 1996-VI Eur. Ct. H.R.

Turkish police custody²⁰ and where police officers subjected a detainee to a large number of severe blows, covering almost all of his body, in addition to pulling his hair and making him run a kind of gauntlet, thus causing severe physical pain and emotional distress.²¹ The Court indicated in *Selmouni v. France* that a more advanced understanding of human rights will require evaluating activities as torture that in former times were only considered inhuman treatment.²²

ii. Inhuman Treatment or Punishment

As noted above, ill-treatment is considered inhuman if it deliberately causes severe suffering but does not have sufficient intensity or purpose to be classified as torture. The European Court has decided in a great variety of cases what treatment or punishment has been inhuman. Overcrowding and squalid conditions of detention and prison cells, insufficient food and sanitary facilities, lack of medical treatment as well as the separation of detainees from their families have been considered inhuman when the treatment went beyond a minimum level of severity.²³ In *Selcuk v. Turkey*²⁴ the destroying of the home and all other personal belongings by security forces, so the victims were left without shelter, was judged inhuman treatment. In the famous case of *Öcalan v. Turkey*²⁵ regarding the leader of the Kurdish separatist organization, the European Court held that the death penalty was inhuman punishment because it was imposed by military judges who were not independent.

As a general rule, treatment or punishment is considered inhuman only if the authorities act with intent to cause suffering and distress. The Court and the Commission have concluded in several cases, however, that inhuman treatment or punishment does not always require intent. In the case of *Kalashnikov v. Russia*²⁶ a prisoner got seriously sick while he was being held in an overcrowded cell with deplorable sanitary facilities. The Court found this type of

20. *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R.

21. *Selmouni v. France*, 1999-V Eur. Ct. H.R.

22. *Id.*

23. *Kalashnikov v. Russia*, 2002-VI Eur. Ct. H.R.; *Dougoz v. Greece*, 2001-II Eur. Ct. H.R.; *Peers v. Greece*, 2001-III Eur. Ct. H.R.

24. 1998-II Eur. Ct. H.R.

25. 2005-IV Eur. Ct. H.R.

26. 2002-VI Eur. Ct. H.R.

punishment to be inhuman even though it could not be assumed that the prison authorities had acted with any intent to cause harm. By dispensing with the intent requirement in such cases the European Court obviously tried to help improve prison conditions in Russia and other Eastern European countries. It may therefore be expected that in the coming years more complaints will be coming from those countries.

iii. Degrading Treatment or Punishment

There is general agreement that treatment and punishment are degrading if they arouse in the victim feelings of fear, anguish and inferiority and, thus, violate the victim's dignity or physical integrity. While torture and inhuman treatment or punishment requires physical or emotional suffering, an act is degrading if it severely humiliates the victim. Typical instances are the breaking down of the physical or moral resistance of a person or driving a person to act against his or her will or conscience.

The first major case where the European Court had to deal with the concept of "degrading" treatment was *Tyrer v. United Kingdom*,²⁷ a case concerning corporal punishment. Under the penal law of the Isle of Man, a small British island in the Irish Sea, a fifteen year old boy was sentenced to three strokes with a birch rod. The punishment was administered by a police officer in a police station. The European Court determined this type of punishment to be degrading because it involved "institutionalized violence" that treated the boy "as an object in the power of the authorities." In subsequent decisions the court found, however, that moderate corporal punishment administered in schools did not amount to degrading treatment.

When deciding whether a particular treatment or punishment was degrading the Court and the Commission always tried to steer a middle course. Bodily searches of prisoners were generally not considered degrading. It was different, however, when the body of a prisoner was thoroughly searched every week, even though there was no suspicion that something might be found.²⁸ Ordinary disciplinary measures imposed by prison authorities have not been held to be degrading. Article 3 was, however, breached in a case where elderly

27. 26 Eur. Ct. H.R. (ser. A) (1978).

28. *Lorsé and Others v. The Netherlands*, 2003-II Eur. Ct. H.R.

and sick detainees were forced to do exhausting physical exercises.²⁹

The Commission and the Court have also found that institutional racism and other kinds of discrimination could amount to degrading treatment. In the case of *Smith and Grady v. United Kingdom*³⁰ a group of individuals had been dismissed from the British Armed Forces for their sexual orientation. Using careful language the Court reasoned in *Smith* that it “would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority . . . could, in principle, fall within the scope of Article 3.” The Court found, however, that in the above case the dismissal from the army could not be considered degrading.

B. Burden of Proof and Duty to Investigate

Persons who have suffered injuries while being detained often have difficulty proving that the injuries were caused by police officers or prison authorities. The European Court and the Commission have tried to solve this problem in two different ways.

In the case of *Ribitsch v. Austria*³¹ the suspect Ribitsch had sustained injuries – severe bruises and a cervical syndrome (an injury of the cervical spine) – while he was held in police custody. Ribitsch claimed that he was severely punched and kicked by the police officers who questioned him. The police officers contradicted his allegation, explaining that Ribitsch, who was handcuffed, had injured himself. They maintained that when Ribitsch tried to get out of a police car he slipped and injured himself on its rear door.

Ordinarily, Ribitsch would have had to prove his allegations. The European Court pointed out, however, that in such situations where typically no independent witnesses are available the injured person would hardly have any chance to prove the truth of his or her allegations. The Court, therefore, reversed the burden of proof, imposing, in this case, an obligation on the Austrian police to provide a plausible explanation of how the injuries were caused. The Court found the explanation of the Austrian police that Ribitsch had injured himself unconvincing. Consequently, the Court concluded that

29. Ireland v. United Kingdom, 1976 Y.B. Eur. Conv. on H.R. 512 (Eur. Comm’n on H.R.).

30. 1999-VI Eur. Ct. H.R.

31. 336 Eur. Ct. H.R. (ser. A) 55 (1995).

Ribitsch had undergone ill-treatment which amounted to inhuman and degrading treatment.

In other cases where the victim could not prove that he or she was ill-treated by the police the European Court took a somewhat different approach. The Court held that after the victim has raised an arguable claim of ill-treatment the Convention requires an investigation to be conducted by the national authorities. If no investigation was carried out or if an investigation was not "sufficiently thorough and effective" the Court found a breach of Article 3 and also a neglect of the general duty of the member states under the Convention "to secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention."³²

In the previously mentioned torture case of *Aksoy v. Turkey*³³ the European Commission even took an additional step. As Turkish authorities did not sufficiently cooperate in trying to find out what had happened to Aksoy, delegates of the Commission went to Turkey to interview witnesses. The Commission thus acted like a first-instance court of fact to find out the truth.

The cases demonstrate how the Court, and in former times also the Commission, tried, with the help of procedural mechanisms, to turn the European Convention into an effective tool for protecting human rights.

IV. Extradition and Deportation

The European Convention on Human Rights does not provide for a right to remain in one of its signatory states. The European Court and the Commission have decided in several cases, however, that a person may neither be extradited nor deported to a country where he or she might be subject to torture or any other kind of ill-treatment. This principle was first established by the European Court in 1989 in the landmark case of *Soering v. United Kingdom*.³⁴

Soering, a German national who suffered from an abnormality of the mind, had allegedly killed the parents of his American girlfriend in Virginia when he was 18 years old. He fled to the United Kingdom, was apprehended there, and the United States requested

32. *Assenov v. Bulgaria*, 1998-VIII Eur. Ct. H.R.; *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R.

33. 1996-VI Eur. Ct. H.R.

34. 161 Eur. Ct. H.R. (ser. A) (1989).

his extradition. Soering opposed the extradition, and his case went to the European Court. The Court ruled that the United Kingdom would violate Article 3 if Soering was extradited. As the European Convention does not prohibit capital punishment, the Court could not reason that Article 3 prohibits extradition in a case where the extradited person would face the death penalty. The Court concluded, however, that in Virginia, where Soering would have to face trial, the average time between a death sentence and execution was seven years. Living under the very severe high-security regime on death row in a Virginia prison would, according to the Court, expose Soering "to a real risk of treatment going beyond the threshold set by Article 3." The Court did not specify whether the treatment would amount to torture, inhuman or degrading treatment. As blame was laid on prison conditions in the United States, such a specification was obviously considered inappropriate from a diplomatic point of view.

The *Soering* decision was remarkable for two reasons. First, the case did not involve a violation of the Convention which had actually occurred but a potential violation which would take place if Soering was extradited. The Court considered it sufficient for Soering to show there was a "real risk" of ill-treatment. Secondly, the violation of the Convention would in the *Soering* case not have happened in the United Kingdom, the extraditing state, but rather in the United States. When forbidding extradition the European Court did not make the United Kingdom responsible for what would happen outside its jurisdiction. The Court rather held that in this case the obligation not to extradite "is inherent in the general terms of Article 3." Extradition "would plainly be contrary to the spirit and the intent of the Article."³⁵

It is interesting to note that the United Nations Convention against Torture contains a similar obligation not to extradite a person to another state if there are "substantial grounds for believing that he would be in danger of being subject to torture."³⁶ Unlike in the European Convention, the protection of the United Nations Convention is restricted to cases where a person would be tortured. On the United Nations level there is also no enforcement machinery

35. *Id.*

36. United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 1465 U.N.T.S. 85.

comparable to the European Court.

Soering had a considerable impact on a great number of deportation cases. In these cases the European Court applied the same standards as in extradition cases. Among other things, the Court evaluated whether there was a real risk of ill-treatment in the state to which a person would be deported. In the case of *Chahal v. United Kingdom*³⁷ the United Kingdom had decided to deport an Indian national who supported a radical Sikh separatist movement in Punjab. Chahal feared that, in case of his return to India, he would be subject to ill-treatment by the Indian authorities. The Indian Government guaranteed there would be no such ill-treatment. The Court took this guarantee into consideration but concluded, nevertheless, that the danger of ill-treatment was imminent. On the other hand, the European Court held in *H.L.R. v. France*³⁸ that France could deport a Colombian drug dealer who had been apprehended by French authorities. The drug dealer argued that he was afraid of acts of revenge by Colombian drug cartels, but the Court reasoned there was not sufficient evidence an actual danger existed.

In a few cases the European Court has stated that the danger of ill-treatment does not need to be caused by a public authority. Consequently, the Court found that deportation would violate Article 3 in a case where there was a real risk that the deported person would be killed by a private party in a civil war.³⁹ German courts have taken a somewhat stricter position because they require that the risk of ill-treatment must come from a public authority. There are serious doubts whether the position taken by German courts is in conformity with the European Convention.

V. Torture to Save Life?

In 2002 the *Daschner* case⁴⁰ gave rise to an intense debate in Germany about whether torture or other kinds of ill-treatment by public officials could be permitted under extraordinary circumstances.

37. 1996-V Eur. Ct. H.R.

38. 1997-III Eur. Ct. H.R.

39. Ahmed v. Austria, 1996-VI Eur. Ct. H.R.; see also D. v. United Kingdom, 1997-III Eur. Ct. H.R.

40. Landgericht Frankfurt/Main, December 20, 2004, Neue Juristische Wochenschrift 2005, 692 (translated by author).

In this case, the eleven year old son of a rich family was kidnapped. When the suspect was apprehended by the police he persistently refused to reveal where he was hiding the child. Actually, the suspect had killed the child but he left the interrogating officers with the impression that the boy was still alive. To save the child's life, Daschner, a senior police officer, ordered a subordinate officer to threaten the suspect with the use of some kind of force, so the suspect would speak. The suspect gave in to the threats and revealed where the dead child was. Daschner and a subordinate officer were charged with "coercion." They had to stand trial, at the end of which the court handed down a decision that proved to be an interesting compromise. The two defendants were found guilty as charged but they were penalized only with a caution, a light sanction hardly ever imposed in a case of coercion.

The decision met with both approval and criticism. Those who approved of the conviction argued, above all, that the constitutionally protected human dignity of the suspect does not permit the use of torture in any case, not even if the existence of the whole country were in danger. They also referred to the European Convention and the International Covenant, which do not permit any exception to be made from the prohibition of torture.

Those who opposed the decision answered, among other things, that Daschner was not an ordinary torture case. It was, rather, a case where the police invaded the human dignity of the suspect in order to save, so they thought, the life and human dignity of the kidnapped child. If the suspect had held the child in his arms pointing a gun at his head and if there was no other way of saving the child, the police would have been authorized to shoot the suspect. In view of that, it would not seem plausible not to allow the police to threaten the suspect with the use of violence, if such a threat appeared to be the only way to save the child. As to the absolute prohibition of torture in the European Convention and the International Covenant, it was argued that both instruments also provide for the protection of human life and, therefore, must be construed as not to outlaw ill-treatment if it is required to save another person's life.

The debate in Germany proves that it is always difficult to rely on general arguments when trying to solve an exceptional case. Exceptional cases should never be taken as a basis for creating a general rule.

The debate in Germany is still going on. It should not be

overlooked, however, that the inner-German debate is different from the international debate about interrogation techniques used in Guantanamo Bay and so-called secret detention centers. The United States Government argues that treatment of detainees in these facilities is necessary to protect the American people. Therefore, accepted interrogation techniques should be broadened. To date, however, no proof has been offered that the life of American citizens is in imminent danger and that ill-treatment of detainees at these facilities is the only way of protecting American citizens.

VI. The Psychological Side of Torture

When talking about problems of torture one should not forget that these problems can never be solved solely with the help of legal provisions and sanctions. It will also be necessary to look at torture and other kinds of ill-treatment from a psychological point of view. The decisive question is how it can happen that a person is willing to commit torture or other acts of ill-treatment against another person. It would be wrong to assume that those acts are committed because there are a few rotten apples, persons who are intrinsically bad. Public officials who commit torture or other kinds of ill-treatment are not persons who beat their wives and children at home. The famous Stanford Prison Experiment carried out by Professor Zimbardo in 1971 demonstrated how a person can be influenced, if not dominated, by the role he or she is playing.⁴¹

In this experiment a group of normal, young college students were put into a simulated prison. The group was randomly split into guards and prisoners. The experiment was designed to last two weeks but it had to be ended prematurely after six days. Some of the would-be prison guards quickly took to their roles humiliating prisoners in an effort to break their will and, thus, maintain order in the prison. When the prisoners objected and finally rebelled, several guards became violent, abusive and even sadistic. In a few days the prison atmosphere transformed its participants. The young men who acted as prison guards were dominated by the roles they played. Their behavior revealed how much their new roles could distort individual personalities. The guards lost sight of reality. To them the atrocities that were committed became the “normal” life in the simulated

41. See generally Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper and Row) (1975).

prison.

Brutalities inflicted on detainees at Guantanamo Bay and at Abu Ghraib confirm what Professor Zimbardo has demonstrated with his Prison Experiment. The same is obviously true as to torture and other kinds of ill-treatment that can be found in police stations, detention centers and prisons in many parts of the world. The question is, what can be done to take care of these problems?

The first thing that comes to mind is the re-education of police officers and other law enforcement officials. Important steps in this direction have already been taken. The United Nations Convention against Torture of 1984 requires that "education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel." The Convention further provides that in cases where the United Nations Committee against Torture finds torture or other acts of ill-treatment being committed in a signatory state, the Committee shall report its findings to that state and make "suggestions" which it deems appropriate. It may be expected that the Committee will in such cases, among other things, suggest training and education.

A similar approach has been taken at the European level. The European Anti-Torture Committee prepares regular reports on member states of the Council of Europe that will, if necessary, include "recommendations" as to further training of law enforcement officials. In practice, the Anti-Torture Committee seems to exercise relatively strict control. Member states regularly cooperate with the Committee by announcing that they will give higher priority to training of their personnel.

Cases decided by the European Court and the European Commission as well as by courts on a national level prove, however, that there are still many instances of torture and other kinds of ill-treatment in a number of European, mainly Eastern and South-Eastern European countries. Training and re-education do not always seem to work in an effective way. One reason may be that instructions are mainly centered on legal questions. It is, however, not sufficient to warn police officers that it is against the law to beat detained persons and that any act of ill-treatment will be punished. As can be expected, law enforcement officers are familiar with these prohibitions.

What will be necessary are instructions based on the experience of the Stanford Prison Experiment, explaining the psychological

implications of being a law enforcement officer. Police officers need to learn how to deal with conflict situations and how best to avoid them. If possible, such instructions should also include role-play. This type of training cannot be introduced overnight because it will require careful planning and, above all, the participation of psychological experts. It must also be expected that psychological training will take considerable time, because human nature cannot be changed easily.

VII. Concluding Remarks

There can be no question that it is necessary to have carefully designed legal provisions to prohibit torture and other kinds of ill-treatment. The main problem today is, however, that these provisions are not always strictly enforced. It is obviously not sufficient to leave enforcement to individual countries. It is necessary to have international institutions – the United Nations Committee against Torture, the European Court and the European Anti-Torture Committee – to make the protection of the individual more effective. Serious efforts in this direction have been taken by the United Nations and the Council of Europe, but protection against torture and other kinds of ill-treatment is far from perfect. Efforts to stop law enforcement authorities from practicing torture must go on – not only in Europe but also in other parts of the world.
